

Substitute Senate Bill No. 414

Senate, April 1, 1998. The Committee on Environment reported through SEN. DAILY, 33rd DIST., Chairman of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING PUBLIC NOTICE OF CERTAIN PERMIT APPLICATIONS TO THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE SITING OF ASPHALT BATCHING AND MIX FACILITIES.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. Section 22a-61 of the general
2 statutes is repealed and the following is
3 substituted in lieu thereof:

4 The Commissioner of Environmental Protection
5 [may] SHALL require any applicant for a permit
6 issued by the commissioner pursuant to any
7 provision of this title to provide notice of such
8 permit application by posting notice of the
9 application in accordance with this section. Such
10 notice shall not be required for a permit for a
11 transportation project, a permit for the burning
12 of brush pursuant to subsection (f) of section
13 22a-174, or a permit for any open burning
14 conducted pursuant to authorized fire fighting
15 training by any fire department. The applicant
16 shall erect and maintain in a legible condition a
17 sign not less than six feet by four feet upon the
18 site where the activity which is the subject of
19 the permit application is located or proposed to
20 be located, which sign shall be clearly visible

21 from the public highway and which sign shall be
22 erected not later than three days after the date
23 the applicant receives, by certified mail, written
24 notice to the applicant that notice under this
25 section is required. The sign shall include the
26 words "Department of Environmental Protection.
27 Permit Applicant. For further information
28 contact:" and a phone number for an office from
29 which any interested person may obtain a copy of
30 the subject application and information regarding
31 the procedure for making comment on the
32 application. The sign shall be maintained for a
33 period of one hundred twenty days or until the
34 date on which the commissioner publishes notice of
35 his tentative determination on the application,
36 whichever is earlier. Any applicant required to
37 post notice in accordance with this section shall
38 submit to the commissioner a written
39 certification, under oath, of compliance with the
40 requirements of this section provided the
41 commissioner may require any additional proof of
42 such compliance. Such certification shall be on a
43 form specified by the commissioner. SUCH FORM
44 SHALL INCLUDE CERTIFICATION THAT NOTICE OF SUCH
45 APPLICATION HAS ALSO BEEN FILED WITH LOCAL
46 MUNICIPAL OFFICIALS, INCLUDING, BUT NOT LIMITED
47 TO, THE CHIEF EXECUTIVE OFFICIAL OF THE
48 MUNICIPALITY WITHIN WHICH THE SITE OR PROPOSED
49 SITE IS LOCATED, THE BUILDING OFFICIAL, THE ZONING
50 ENFORCEMENT OFFICIALS, LOCAL HEALTH OFFICIALS, AND
51 ANY LOCAL ENVIRONMENTAL COMMISSION, COMMITTEE, OR
52 OFFICIALS. The commissioner shall not process an
53 application until the applicant has submitted to
54 the commissioner the certification required by
55 this section. If the commissioner determines that
56 posting notice in accordance with this section
57 will not adequately apprise the public and
58 abutting landowners of the proposed activity, the
59 commissioner may require any other reasonable form
60 of notice he deems necessary.

61 Sec. 2. Section 22a-183 of the general
62 statutes is repealed and the following is
63 substituted in lieu thereof:

64 (a) Any person who owns or is in control of
65 any plant, building, structure, process or
66 equipment may apply to the commissioner for a
67 permit granting an exemption or partial exemption
68 from regulations issued pursuant to this chapter

69 governing the quality, nature, duration or extent
70 of discharges of air pollutants. The application
71 shall be accompanied by, or the applicant shall
72 furnish, such information and data as the
73 commissioner may require. The commissioner may
74 grant such permit if he finds that the discharges
75 occurring or proposed to occur do not constitute a
76 danger to public health or safety, and compliance
77 with the regulations from which exemption is
78 sought would produce SUBSTANTIAL practical
79 difficulty or hardship without equal or greater
80 benefits to the public.

81 (b) No permit shall be granted pursuant to
82 this section (1) except after A public hearing
83 HELD by the commissioner, [and] (2) until the
84 commissioner has considered the relative interests
85 of the applicant, owners of other property likely
86 to be affected by the discharges, and the general
87 public, as specified in section 22a-176, AND (3)
88 UNLESS THE COMMISSIONER HAS DETERMINED WHETHER THE
89 SOURCE, EITHER ALONE OR IN COMBINATION WITH
90 ANOTHER SOURCE, IF GRANTED SUCH PERMIT, ENDANGERS
91 PUBLIC HEALTH, SAFETY OR WELFARE OR THE
92 ENVIRONMENT.

93 (c) The exemption or partial exemption
94 granted by any permit pursuant to this section
95 [may] SHALL be limited in duration TO NO MORE THAN
96 FIVE YEARS. [in the discretion of the
97 commissioner.] THE COMMISSIONER OF ENVIRONMENTAL
98 PROTECTION MAY, UPON FURTHER APPLICATION PURSUANT
99 TO THIS SECTION, GRANT FURTHER EXEMPTION OR
100 PARTIAL EXEMPTION FROM THE REGULATIONS ADOPTED
101 UNDER THIS CHAPTER FOR ADDITIONAL PERIODS OF NOT
102 MORE THAN FIVE YEARS DURATION.

103 (d) FOR ANY APPLICATION FOR A PERMIT UNDER
104 THIS CHAPTER PENDING BEFORE THE COMMISSIONER ON
105 THE EFFECTIVE DATE OF THIS SECTION FOR WHICH THE
106 COMMISSIONER HAS NOT PUBLISHED NOTICE OF HIS
107 TENTATIVE DETERMINATION ON THE APPLICATION, IF THE
108 COMMISSIONER DETERMINES THAT COMPLIANCE BY AN
109 APPLICANT WITH THE REQUIREMENTS OF SECTION 22a-61,
110 AS AMENDED BY SECTION 1 OF THIS ACT, IS NECESSARY
111 TO MORE ADEQUATELY APPRISE THE PUBLIC OR ABUTTING
112 LANDOWNERS OF THE PROPOSED ACTIVITY, THE
113 COMMISSIONER MAY REQUIRE COMPLIANCE WITH SUCH
114 SECTION.

115 Sec. 3. (NEW) No asphalt batching or
116 continuous mix facility shall be located in an

117 area which is less than one-third of a mile in
118 linear distance from any hospital, nursing home,
119 school, area of critical environmental concern,
120 watercourse, or area occupied by residential
121 housing. Such distance shall be measured from the
122 outermost perimeter of such facility to the
123 outermost point of such zones provided that any
124 such facility in operation as of December 1, 1997,
125 shall not be subject to the provisions of this
126 section.
127 Sec. 4. This act shall take effect from its
128 passage.

129 ENV COMMITTEE VOTE: YEA 22 NAY 1 JFS

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"THE FOLLOWING FISCAL IMPACT STATEMENT AND BILL ANALYSIS ARE PREPARED FOR THE BENEFIT OF MEMBERS OF THE GENERAL ASSEMBLY, SOLELY FOR PURPOSES OF INFORMATION, SUMMARIZATION AND EXPLANATION AND DO NOT REPRESENT THE INTENT OF THE GENERAL ASSEMBLY OR EITHER HOUSE THEREOF FOR ANY PURPOSE."

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FISCAL IMPACT STATEMENT - BILL NUMBER SSB 414

STATE IMPACT	Potential Minimal Cost, Within Budgetary Resources, see explanation below
MUNICIPAL IMPACT	Minimal Cost, Within Resources, see explanation below
STATE AGENCY(S)	Departments of Environmental Protection, Office of the Attorney General

EXPLANATION OF ESTIMATES:

STATE IMPACT: Requiring permit applicants to provide notice of their applications through sign posting (this is discretionary under current law) will minimally increase costs to the Department of Environmental Protection. DEP is required to provide written notice of this requirement to applicants. It is anticipated that these costs are within budgetary resources. It is also possible that the additional posting of signs could result in additional requests for public information and hearings. At this time, this workload increase is anticipated to be handled within current resources.

Any additional determinations which will need to be made by DEP before issuing permits exemptng facilities from air pollution regulations are not anticipated to impact the DEP workload.

The asphalt facility siting prohibitions will have no fiscal impact on DEP. In addition, if a lawsuit results from the prohibition (see OLR Bill Analysis), any casework resulting can be handled wtihin the

routine duties of the Office of the Attorney General, and will have no additional fiscal impact on the office.

MUNICIPAL IMPACT: Any increase in the administrative workload of municipalities due to additional filings with municipal officials is anticipated to be minimal and handled within existing resources.

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OLR BILL ANALYSIS

SSB 414

AN ACT CONCERNING PUBLIC NOTICE OF CERTAIN PERMIT APPLICATIONS TO THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE SITING OF ASPHALT BATCHING AND MIX FACILITIES

SUMMARY: This bill requires, rather than allows, the Department of Environmental Protection (DEP) to require permit applicants to provide notice of their applications on a large sign posted on the proposed activity site. It also requires them to file notice with local officials.

The bill slightly modifies the different findings DEP must make before granting exemptions from air pollution regulations and requires it to determine whether the proposed exemptions would cause the facilities, alone or in conjunction with others, to threaten the public health or the environment. It also limits the exemption permits to five years, rather than leaving them to the DEP's discretion.

The bill prohibits asphalt batching or continuous mix facilities from locating within one-third of a linear mile, measured from the edge of each property, of any hospital, nursing home, school, residential housing, watercourse, or critical environmental area. The prohibition does not apply to facilities operating on or before December 1, 1997.

EFFECTIVE DATE: Upon passage

FURTHER EXPLANATION

Notice Requirements for DEP Permits

Under the bill, DEP must require permit applicants to post notice for up to 120 days on a large sign at the subject site. Current law allows it to require posting. By law, permits for transportation projects, brush burning, and open burning for firefighter training are exempt from the notice requirements.

The bill also requires such applicants to certify that they have filed notice of the application with the local officials including (1) the municipality's chief executive official; (2) building, zoning enforcement, and health officials; and (3) local environmental commissions or officials.

Air Regulation Exemption Permits

By law, facilities may apply to DEP for permits exempting them from air pollution regulations. The bill sets slightly stricter requirements for such permits. It requires DEP to find that compliance with the regulations would cause substantial practical difficulty and hardships, rather than just practical difficulties and hardships. It limits the permits to five years but allows applicant to reapply for additional five-year permits.

Before issuing a permit DEP must determine whether doing so would cause the facility, alone or in combination with others, to endanger the public health or the environment. By law, before issuing a permit, DEP must (1) hold a hearing; (2) consider the relative interests of the applicant, affected property owners, and the general public; and (3) determine that the proposed discharge does not constitute a danger to the public health or safety.

Upon its passage, the bill allows the DEP to require applicants with pending exemption permit applications to comply with its enhanced notice requirements if the department (1) has not published a tentative determination and (2) determines it is necessary to adequately apprise the public or abutting landowners.

BACKGROUND**Notice Sign**

The posted sign must be at least six by four feet, upright and in legible condition, and clearly visible from the public highway. It must state that it is for a DEP application and contain a contact name and number where interested parties can get a copy of the application. It must be put up within three days of receiving a DEP letter about the sign requirement and must be maintained for the lesser of 120 days or until the DEP publishes a tentative decision.

Asphalt Facility Permits

Asphalt making facilities require two DEP permits. First a construction permit to build the facility and then an operating permit before it can produce asphalt.

After issuing a construction permit, the DEP may issue an operating permit if it determines the facility (1) was built in accordance with the construction permit, (2) will operate in accordance with applicable requirements, and (3) satisfactorily completed its performance test.

Permits-Property Interests

The siting prohibitions may raise issues related to the due process clause of the 14th Amendment of the Constitution with respect to facilities issued a construction permit but not an operating permit. The 14th amendment protects citizens against deprivation of life, liberty or property, without due process of law. The courts have found expected permits to be protectable property rights in some circumstances (Sullivan v. Salem, 805 F.2d 81 (2nd Cir. 1986)). The affected parties would have to establish that they have a clear entitlement to the permit not just a unilateral expectation (Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). Clear entitlement means a virtual assurance because of the lack of discretion of the issuing authority (Yale Auto Body Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2nd Cir. 1985); Red Maple Properties v. Zoning Commission, 222 Conn. 730, 738 (1992)). If they can establish a property interest, they would have to show arbitrary or oppressive conduct in its denial. Generally, states have broad discretion in matters involving the public health and safety. The success of such a challenge would depend on the precise facts and circumstances involved.

Related Bills

sSB 597, favorably reported by the Environment Committee, establishes a two-year moratorium on permits for asphalt facilities.

sSB 435, favorably reported by the Environment Committee, requires the DEP to provide notice to municipalities when they receive, issue a decision, or take enforcement action on certain permits or applications.

COMMITTEE ACTION

Environment Committee

Joint Favorable Substitute
Yea 22 Nay 1